No. 73-2055

In the Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
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SECURITIES INVESTOR PROTECTION CORPORATION,
PETITIONER

v.

JAMES C. BARBOUR, AS RECEIVER FOR GUARANTY BOND AND SECURITIES CORPORATION AND GUARANTY BOND COMPANY, INC., AND SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

ROBERT H. BORK,
Solicitor General,

WILLIAM L. PATTON,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

LAWRENCE E. NERHEIM,
General Counsel,

DAVID FERBER,
Solicitor,

WILLIAM F. BAVINGER III,
Special Counsel,
Securities and Exchange Commission,
Washington, D.C. 20549.

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The receiver has urged that the absence of an implied right of action would subvert a fundamental purpose of the Act—to provide financial relief for customers who incur losses as a result of financial difficulties of broker-dealer members of the Securites Investor Protection Corporation ("SIPC"). As evidence of this, he refers to "the Commission's demonstrated lack of enthusiasm for taking any affirmative action on behalf of Guaranty's customers other than the application for the appointment of a receiver" (Br. 19).

As we pointed out in our main brief (p. 10, n. 7), this was one of the first cases to arise under the Securities Investor Protection Act ("SIPA")[1], which was enacted and became effective on December 30, 1970, one week after the Commission brought suit against Guaranty Bond for violation of the Commission's "net capital" rule (17 C.F.R. 240.15c3-1) (App. 1). On January 29, 1971, in response to the Commission's request, the district court appointed a receiver for Guaranty Bond (App. 54-59). At that time it was unclear whether customers of Guaranty Bond were eligible for protection under the Act.

In response to a letter from the receiver, dated January 31, 1972, the Solicitor of the Commission requested by letter, dated February 10, 1972, "advice as to whether Guaranty Bond * * * did business with customers subsequent to December 30, 1970" (App. 66). After the receiver, on March 31, 1972, sought a determination by the district court regarding the applicability of SIPA (App. 19-27), the Commission advised the district court that it was (App. 63-64).

> of the view that SIPA coverage should not be withheld merely because the Commission filed this action prior to the effective date of SIPA, or because the firm was in net capital violation in 1970, since it appears that the firm continued to engage in the securities business until at least January 5, 1971. Action by SIPC is necessary, however, only if it appears that the firm will otherwise fail to meet its obligations to customers. There has been no demonstration that the customers of Guaranty Bond and Securities Corporation will in fact sustain any losses. In this connection, from information obtained from SIPC, it appears that the Receiver, as Receiver of Guaranty Bond and Securities Corporation, may have causes of action for damages or restitution against either the parent, Guaranty Bond Co., Inc., or against individual principals of the parent, which could redound to the benefit of the customers of Guaranty Bond and Securities Corporation.

[1]We also noted that the factual posture of this case is not likely to recur because a comprehensive reporting system has been developed (see our main brief, p. 10 n. 7).

In its Memorandum filed January 10, 1973 (App. 72-78), the district court rejected the Commission's contention with respect to the applicability of SIPA, although it stated, without having conducted an evidentiary hearing, that Guaranty Bond continued to do business for several days after the Act's effective date. Subsequently, the court of appeals agreed with the Commission's position as to the applicability of SIPA (App. 80-89).[2]

As pointed out in our main brief (p. 13, n. 11), we do not maintain that Congress intended that the protections of the Act might be arbitrarily withheld from customers of an insolvent broker-dealer whose claims cannot otherwise be satisfied. Should this Court hold that the receiver has no right of action against SIPC, the Commission will forthwith afford both the receiver and SIPC an opportunity to submit facts and arguments as to whether the Commission should, pursuant to Section

[2]The question of the applicability of SIPA was presented in SIPC's petition for a writ of certiorari in this case. This court's grant of certiorari was limited to whether a private right of action may be implied under SIPA, and if so, whether a receiver of a member of SIPC has standing to maintain an action (App. 92).

7(b) of the Act, 15 U.S.C. 78ggg(b), apply to the United States District Court for the District of Columbia for an order requiring SIPC to discharge its obligations under the Act in this case.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WILLIAM L. PATTON,
Assistant to the Solicitor General.

LAWRENCE E. NERHEIM,
General Counsel,

DAVID FERBER,
Solicitor,

WILLIAM F. BAVINGER III,
Special Counsel,
Securities and Exchange Commission.

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